

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1193 *B PPS*

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLAYBURN C. BOGDAN,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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IN THE

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No. 76-1193

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLAYBURN C. BOOTH,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

This tax fraud case was tried before the Hon. John T. Curtin, United States District Judge, and a jury. Judge Curtin's decision denying the defendant's motion to set aside the verdict of guilty is not reported.

Statement of the Issue Presented for Review

Whether the evidence, viewed in the light most favorable to the Government, is sufficient to support the jury's verdict.

Statute Involved

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case

The defendant, a physician practicing at Niagara Falls, New York, was indicted on three counts of knowingly and willfully attempting to evade his federal income taxes for the years 1966, 1967 and 1968. A verdict of guilty was returned on all three counts. The defendant's motion to set aside the verdict as against the weight of evidence was denied. The court sentenced him to be fined the sum of \$3,500 with respect to each count, the sentences "to run concurrently."

The prosecution was based upon the bank deposits method of reconstructing taxable income. The great bulk of the Government's proof was devoted to an explanation of this theory and its application to the facts of the case. Although much of this testimony is confusing and difficult to follow, a jury could reasonably conclude that the taxpayer failed to report a substantial amount of income in each of the three years involved. This is evident by comparison of figures taken from the original returns (Col. 1, Government exhibits 1-3), the returns as reconstructed by the Government's agents (Col. 2, Government exhibits 48 and 50) and the amended returns filed by the taxpayer on October 29, 1971 (Col. 3, Government exhibits 4-6).

Year 1966

	(1)	(2)	(3)
	<i>Form 1040</i>	<i>Audit</i>	<i>Form 1040X</i>
Adj. gross income	\$26,266.32	\$38,460.62	\$44,918.48
Deductions & exemp.	5,906.00	6,040.43	5,906.00
Taxable income	20,360.32	32,420.19	39,012.48
Income & SE tax	\$ 4,812.97	\$ 8,115.17	\$10,236.02

Year 1967

	(1)	(2)	(3)
	<i>Form 1040</i>	<i>Audit</i>	<i>Form 1040X</i>
Adj. gross income	\$36,505.17	\$48,857.27	\$52,929.34
Deductions & exemp.	6,786.20	7,040.03	6,786.20
Taxable income	29,718.97	41,817.24	46,143.14
Income & SE tax	\$ 7,771.30	\$12,311.31	\$14,419.31

Year 1968

	(1)	(2)	(3)
	<i>Form 1040</i>	<i>Audit</i>	<i>Form 1040X</i>
Adj. gross income	\$36,210.78	\$50,076.26	\$56,065.41
Deductions & exemp.	7,502.99	7,696.02	7,502.99
Taxable income	28,707.79	42,380.24	48,562.42
Income & SE tax	\$ 8,274.85	\$14,518.70	\$17,814.32

Although the bank deposits method does not identify specific items of omitted income, the evidence would support a finding that the defendant did not report income which he received in the form of checks from private patients. With a single exception, the evidence would not support a finding that he omitted any checks received from Blue Shield, Medicare, welfare, workmen's compensation or similar insurance programs, nor would the evidence support a finding

that he omitted any income covered by a 1099 or a W-2 or any income received in cash. That substantial amounts of income were omitted, however, was clearly established.

The case is thus reduced to the question of willfulness—the specific intent to evade an income tax obligation.

A. The Doctor and His Practice

The Doctor's receptionist, Bonelle Balch, testified for the Government. She described his office, which was also his home, as situated in a low-income, working class neighborhood (206).* About 70 per cent of his patients were black (209). About 75 per cent were on welfare (210).

In the mornings Dr. Booth would do his hospital rounds or perhaps be in surgery (207). Miss Balch used this time to catch up on her paper work, typing welfare and insurance forms (192-193). The office opened for patients at 1:00 P. M. (193, 214). She left at 5:00 P. M. but knew that the Doctor was often seeing patients until midnight or later (196, 207). She had known him to work 22 hours a day (208), seeing 60 or 80 patients a day (196).

For an office call, Dr. Booth charged about \$3 or \$4 (210).

If a patient paid cash, Miss Balch would write out a receipt and keep a copy in her receipt book (194). The cash went into her desk drawer where it was available for minor expenses and to make change (195, 198, 215). Occasionally the Doctor or his wife would take some out (197). As time went on, less cash was received because more people were being accepted for Medicare (211).

* References are to pages of the transcript, except that in the case of the witness Lonardo references are to pages of the Appendix.

If a patient paid by check, Miss Balch normally would not write out a receipt, nor did she keep a record of checks received (195-196). The checks would simply go into her drawer with the cash until deposited by Dr. or Mrs. Booth or Miss Balch (200-202).

On the subject of patient care, Miss Balch testified (208):

"Our primary concern was getting the patients in so he could treat them and get them out of the office and get more in so that they may be treated. This was our main concern, was getting the patient treated."

On the subject of billing, she testified (209):

"We spent very little time. If someone would pay their bill, we would just mark them paid and that would be about the extent of it. We never had a set billing system. Just whenever time permitted, we would send the bills out here and there."

On the subject of payment, she testified (208):

"Well, if they didn't pay, he wouldn't pursue it any further. He once made the statement, 'If they don't pay me, they need the money more than I do.'"

B. The Tax Preparer and His System

Dominick Lonardo kept the defendant's books and prepared his tax returns. Although he had a two-year certificate in accounting, Mr. Lonardo was not an accountant and did not do accounting work (8a-9a).^{*} He worked in production control for Union Carbide. He had known Dr. Booth as a physician and a friend, and first undertook to prepare the Doctor's tax returns about 1964. (10a). The defendant was not yet engaged in private practice and had no business income or expenses so that "it was a simple return. He just didn't know how to proceed to get it done"

* References in this section of the brief are to pages of the Appendix.

(11a). It was simply a question of entering on form 1040 the income from Dr. Booth's W-2 and his wife's W-2 and computing the tax (12a).

After the Doctor opened his own office, Mr. Lonardo continued to prepare his tax returns and began keeping his books. For this purpose, to use a word Mr. Lonardo seems to have favored, he "developed" a set of forms and he "developed" a system. He specifically exonerated the defendant from any responsibility for any fault, failure or defect in the system (35a):

"This is my own personal development of the book and the system. This is the way I prepared it. The doctor did not have anything to do with it. I prepared it myself."

The heart and soul of Mr. Lonardo's system was something called the "Dome Simplified Weekly Bookkeeping Record." Once or twice a month he would pick up Dr. Booth's checkbook and invoices and take them home and enter all of his expenditures in the Dome Simplified Weekly Bookkeeping Record (defendant's exhibits 19 and 25). He would enter the date, describe the disbursement, list the check number or indicate that the item was paid in cash, and the amount. Although the Dome Record provided a space for listing business or professional receipts, Mr. Lonardo did not keep such a record, instead relying on 1099s, W-2s and other sources of information for this purpose (16a).

Mr. Lonardo testified that after posting expenses from the checkbook to the Dome Record, "I broke these entries or transactions down into my developed form of accounts, if you will, indicating the breakdown, for example, medical supplies, repair, maintenance, uniforms, laundry services of some kind" (34a). The Internal Revenue Service did not question any of these deductions, and indeed gave the

Doctor larger business and personal deductions for all three years than Lonardo had claimed. So much for deductions.

On the income side, Mr. Lonardo assembled the information from 1099s and W-2s (16a), which represented the great bulk of his client's income, and then he attempted to add in office receipts "in a summary listing that I myself had developed showing what the amount of money was from that particular source and it was added to the other sources of income to prepare the total income for the year" (18a). He did not ask for or receive copies of the receipts which Miss Balch had issued to patients who paid cash (17a-18a). Neither did he ask for or receive the Doctor's bank statements (60a-61a). He did ask for, and he received, monthly slips of paper showing the amount of cash received each month during the year (17a). These he transcribed in his own handwriting onto schedules which he labeled "CC Booth Ofc Receipts" (Government exhibit 44 totaling \$1,292 for 1967 and exhibit 46 totaling \$1,362 for 1968).

Here is Lonardo describing these monthly slips of paper (18a) :

"He only gave me what I asked him for, sir. These I wanted the nature of the moneys from his office calls on a slip of paper and this is what he gave me. He gave me what I asked him for."

And again on cross-examination (36a) :

"Yes. I called it, 'I would like to have from you, doctor, a number indicating the cash office calls and visits you have actually received during the course of the year by month. I need a breakdown by month because it will serve me as a correct comparison here to know what kind of activities you are having as office calls and visits.'

Q. You asked him for the cash office calls?

A. This is what he gave me. He gave me everything I asked for.

Q. Did he ever fail to give you anything that you asked for?

A. No, never."

Then there was Government exhibit 47, "a listing that I myself developed, the intent of which is to serve as a guideline showing the various sources of income" (21a). Mr. Lonardo used this as a year-to-year comparison and also for income averaging. When he made the comparison for 1966 and 1967, he noticed that "Office Receipts" had decreased from \$4,108 to \$1,292. He questioned the Doctor about this and learned that in 1967 more and more people were qualifying for Medicare (24a). To get a proper picture, office receipts should be combined with or related to income from Social Services (24a). Mr. Lonardo then wrote at the bottom of his 1967 "Ofc Receipts" schedule (exhibit 44) the following:

"Note: Because majority of patients are welfare type, above receipts should be associated with income from Social Services."

A similar comment appears on the "Ofc Receipts" schedule for 1968 (Government exhibit 46).

As the due date for the 1968 return approached, Mr. Lonardo had another problem. Two 1099's were missing. The first should have been received from Niagara County welfare, the source of by far the largest part of the taxpayer's income. Dr. Booth accordingly wrote a letter dated March 13, 1969 (defense exhibit 27), requesting this information. The letter was returned with the notation "\$41,750," which Lonardo entered on his summary schedule and on the Doctor's form 1040.

The other 1099 should have come from Blue Shield, Medicare-Part B. In 1966 \$40 had been received from this source, and in 1967 \$1,833, but because of a computer

situation there was no 1099 for 1968. Since Lonardo did not keep records of the Doctor's income or independently verify his income, he called Blue Shield a couple of times for this figure (he thought he spoke to a "Mr. Shields," 64a). Still the 1099 did not arrive, so Lonardo entered "unavail" in his Medicare-Part B column for 1968 (Government exhibit 47) and prepared the return without this figure. He intended to file an amended return as soon as the information came in (66a). It never occurred to him that he might obtain an extension of time (82a). He never asked to see a record of his client's Medicare checks (81a). He never thought of looking anywhere else (67a):

"Well, no, not necessarily, sir. I will tell you why. I was using the guideline or the set of criteria that the 1099 were the sources or the information returns were the sources of income and if I were to consider going to some other source of income to determine what this figure may have been, it is quite possible in my own mind that I could have distorted some figures or some income represented on the 1040. I used the same set of criteria for all three years and I saw no reason to deviate from that."

So \$4,864.80 of Medicare income was omitted in 1968.

Mr. Lonardo did not sign any of these tax returns as the preparer (32a). He thought it was not necessary (33a). He reviewed them with the Doctor only to the extent of explaining what balance was due and what the quarterly estimates were (30a-31a, 86a). He was never compensated for his services (235a), which perhaps brings to mind an old saying.

⁶ Lonardo's instincts in this respect were sound: the 1099s never agreed with the actual checks issued by Blue Shield in a given year because of what the Blue Shield witness called some "timing" problems (95, 103, 112, 118, 120, 121).

C. The Government Agents and Their Investigation

This case began when Dr. Booth's 1967 return was selected for audit. The revenue agent, one Ronald Luke, later broadened his investigation to include the other years, and he brought in special agents Pasquarella and Ciesla. Throughout the investigation, the agents were focusing on omitted income and seeking an explanation for the omission. They did not disturb the taxpayer's deductions, except to increase them (500-503, 511-512), and they did not alter or challenge his figures for cash received (363, 491-492). They were all aware that he had no tax or accounting experience (345, 424).

Mr. Luke's first meeting with Dr. Booth was at the Doctor's office on September 23, 1969. The taxpayer was not represented by an attorney or an accountant, although Mr. Lonardo was there (342). Upon request, Dr. Booth turned his records for the year 1967 over to the revenue agent (302), except for a few bank statements that were missing because of fire or water damage (303). The Doctor stated that he would secure the missing records from the bank and make them available to Mr. Luke (303), and he did (304).

Six days later Luke again went to the taxpayer's office and prepared a bank deposit analysis for 1967 (304). Finding about \$7,000 of deposits in excess of reported income, he decided to go into the 1968 return. The next day, September 30, he returned to the Doctor's office and examined the bank deposits for 1968 (305). This time he thought he found about \$24,000 of excess deposits (305), a figure which he later substantially modified. He pressed the Doctor for an explanation. Dr. Booth thought that approximately \$13,000 to \$16,000 of deposits in 1968 may have come "from a cash accumulation of prior years which

he had saved over a number of years and kept in his house" (306). Mr. Luke then left, saying he would recheck his figures (307). A few days later he called Dr. Booth to say he wanted to review the records again more carefully. The Doctor promised to leave his records for both years at Mr. Luke's office. This he did on November 4, 1969 (307, 39⁰²).

When he voluntarily delivered his bank statements to the Internal Revenue Service on November 4—statements that became the basis for his indictment and conviction—Dr. Booth left a note for Mr. Luke (Government exhibit 42). In pertinent part this note stated:

"In March 1968 and July 1968 I transferred \$6,000 then \$7,000 to my checking account, this represents monies that I had saved & accumulated over many years dating back to my military time in 1950. These monies were deposited in my checking account at various intervals in case I needed them for business and when my bank balance improved then I drafted check against it for deposit in my checking account."

As a matter of fact Dr. Booth did have \$13,000 in his checking account at the end of 1965 (Government exhibit 22, bank statement for period ending Jan. 26, 1966), so it is perfectly obvious that he had saved substantial sums of money over a period of years and before the period covered by the audit. In his note delivered to Mr. Luke on November 4, Dr. Booth was explaining that he had transferred \$13,000 to his savings account (he mistakenly said checking account) in March and June (he erroneously said July). The bank records for the Doctor's checking account (Government exhibit 24) and his savings account (Government ex. bit 33) do show the transfer of \$6,000 on March 4 and \$7,000 on June 25, 1968. Mr. Luke acknowledged that the story about a \$13,000 "accumulation" may have had

reference to this transfer of funds (348). He further testified that, although he found the Doctor's note "ambiguous" and "confusing," he was not misled and he knew the Doctor simply made a mistake in saying that the transfer was from his checking account to his checking account (356-357).

Nevertheless, the investigation dragged on. By late 1969 special agent Pasquarella was in the case. He and Luke interviewed the taxpayer on December 16 (343). Although informed of his rights and still not represented, Dr. Booth answered their questions freely (405-406). On February 17, 1970, they went at it again (360). Pasquarella worked on the case 176 hours but couldn't produce a result (426).* The file was reassigned to special agent Ciesla. He interviewed Dr. Booth on October 12, 1971, over two years after the original meeting with Luke (471):

"I asked Dr. Booth why he recorded the cash he received in his office but not the checks and Dr. Booth said that it never occurred to him that the checks he received in his practice should be included in the office receipts. He said that once these checks were deposited, he assumed they would be reported."

Although seemingly laid to rest by the defendant's written explanation to Luke on November 4, 1969, the question of a cash hoard continued to surface. Pasquarella remembered it one way (409-410), Ciesla another (472-474). Nobody believed there was a cash accumulation because examination of the defendant's deposit tickets disclosed no cash deposits (381-382, 424, 443). Conversely, the agents found no checks received by Dr. Booth that were not deposited (526, 540 and stipulation at 463). Deposit tickets were introduced covering about 2,200 checks (471).

* Luke put in over 800 hours (330).

The Doctor also suggested that the timing of deposits might distort his income from year to year, particularly 1967 and 1968 (386, 415). At the end of 1967 he did have about \$10,000 of checks on hand (364-367) which he deposited on January 15, 1968 (Government exhibit 24). The special agents knew that year-end items were a problem (429), and made adjustments for them (483).

In all this process of interviewing, explaining, searching and speculating, the agents found Dr. Booth cooperative (346, 348). He simply turned his records over to them (302-303, 307, 310). Although for over two years he had no idea what the Internal Revenue Service was looking for (470), and was beginning to feel harassed (471), he persisted in cooperating with them. During most of this period he was without counsel. And even after he was represented and presumably knew the seriousness of the matter, he had no objection to still another interrogation in question and answer form (521-522).

He was indicted on April 12, 1973.

ARGUMENT

POINT I

The Government Did Not Prove Willfulness.

The Supreme Court has formulated the requirement of willfulness, for purposes of various federal tax offenses, as "bad faith or evil intent," *United States v. Murdock*, 290 U.S. 389, 398 (1933), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies v. United States*, 317 U.S. 492, 498 (1943), or knowledge that "he should have reported more income than he did," *Sansone v. United States*, 380 U.S. 343, 353 (1965).

More recently, in *United States v. Bishop*, 412 U.S. 346, 361 (1973), the Court stated:

"The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."

The sole question raised on this appeal is whether the appellant falls in the former category or the latter, and whether the evidence is sufficient to support the jury's finding that he was, indeed, a "purposeful tax violator."

In all fairness the point of departure must be the fact that this physician lacked both understanding and experience in tax matters. It would probably be fair to add that he had little interest in the subject, and perhaps less time for it, but no one should argue that he had any understanding or comprehension of the intricacies of federal income tax law. He did not have the ability to prepare his own

return when all he had was a W-2, much less a return that included business expenses, apportionments, depreciation schedules and income averaging. So he had to rely on someone else.

This conclusion is not at all altered or affected by the contention of the Assistant U. S. Attorney in his summation that the defendant was an educated man (668), "a person sophisticated enough to set up a retirement plan for himself, a person sophisticated enough to have particular investments." With respect to the first part of this argument, there is probably not a doctor in the fifty states who hadn't heard of HR-10. That does not require a very great degree of sophistication. With respect to the second part of the argument, the defendant's gross dividends averaged only about \$45 a year, and he had taxable income from this source only in one year (\$12.79 in 1968). If that makes him "sophisticated," it does not exactly make him a financier.

And even if the Doctor were judged by a higher standard, a standard that might apply, let us suppose, to a specialist grossing three times as much and armed with Professional Economics and a firm of C.P.As, one could only conclude that he was as negligent about his income as he was about his income tax. There was no real system of billing. If a bill went out and was not paid, that was the end of it. But this doctor did not have Professional Economics, he did not have a C.P.A., he had Lonardo.

There was nothing wrong with the Dome Simplified Weekly Bookkeeping Record so far as expenditures were concerned, but it was totally inadequate as a record of income. It provided space only for the listing of daily and weekly totals, and it did not permit the entry of individual

items or their characterization as to type or source. Certainly Lonardo could have, and perhaps he should have, kept a set of books showing the periodic receipt of the Doctor's income in as much detail as his expenses. It seemed to him unnecessary to do this. He knew that most of his client's income, perhaps not 99 per cent as the Doctor hyperbolically stated (415), but by far the greater part of his income was received from sources that would file information returns for tax purposes. Nuclear Materials and Equipment Corporation filed a W-2. Medicare, the State Insurance Fund, Blue Shield of Western New York, the Niagara County Welfare Department and the City of Niagara Falls all filed 1099s. Use of the figures shown on these returns not only obviated the necessity for an independent set of formal records, but avoided as well the possible or probable inconsistencies that would arise between two sets of figures.

The only thing missing was "office receipts." To fill this gap, Lonardo asked the defendant to keep a monthly list of his "cash office calls" (36a) and "the moneys from his office calls on a slip of paper and this is what he gave me. He gave me what I asked him for." (18a). These monthly records, which Mr. Lonardo transcribed onto his annual summaries of "CC Booth Ofc Receipts," included only cash and not checks received. Dr. Booth explained to the agents that it never occurred to him to include checks in his office receipts (471) because "once these checks were deposited, he assumed they would be reported." Let us consider several propositions:

1. Lonardo asked for the amount of "cash office calls" and "moneys from his office calls," and that is what the Doctor gave him.

2. The Government does not challenge or question the accuracy of this information for any of the three years. *This is the reverse of the usual case in which checks are reported but cash is not.*

3. All 2,200 checks were endorsed for deposit. Not a single check was cashed or otherwise failed to pass through the Doctor's account.

4. The deposit tickets constituted a contemporaneous record of checks received, including both those which were covered by an information return and those which were not.

5. Lonardo never requested and never examined these banking records. If he had, he would have seen instantly that they did not reconcile with the 1099s.

6. The first thing the revenue agent asked for was the banking records, and they were immediately made available to him.

7. It defies belief that a person knowingly and willfully omitting an entire category of income would first make a complete record of that income and then deliver that record to the Internal Revenue Service.

It would serve no useful purpose to recite and compare the evidence in other reported cases, but unlike many of them this case does not involve the destruction of records, the maintenance of false records, the submission of false information to the taxpayer's accountant or to the Internal Revenue Service, or the withholding of material information. This is a classic case for invocation of the principle that willfulness must be established by evidence independent of the understatement of income. *Holland v. United States*, 348 U.S. 121, 139 (1954); *United States v. Slutsky*, 487 F. 2d 832, 844 (2 Cir. 1973), cert. den. 416 U.S. 937.

Although both *Holland* and *Slutsky* hold that a consistent pattern of understating substantial sums of income may be considered by the jury along with other evidence bearing on the issue of intent, this does not modify the rule that intent cannot be inferred from the mere understatement of income alone. Otherwise, in a case involving multiple years, the Government would not have to prove beyond a reasonable doubt each element of the offense for each individual year, *cf. Holland v. United States, supra*, at p. 129, but could string together two or three weak counts in a self-reinforcing chain.

The appellant concedes that if the evidence is sufficient to support a conviction for one year, it is sufficient for all three. There is very little to distinguish one count from another. The same procedure was followed each year. Mr. Lonardo requested and was given the same information. He assembled it in the same way onto the same forms. He had a number for every space. He avoided his client's deposit records for fear they would not reconcile with the 1099s. Mentally he divided the Doctor's income into two classes, "information return" receipts and "office receipts." This categorization breaks down in the case of checks, which may fall into either class. Nevertheless, this was the procedure which was consistently followed in the preparation of the returns. If it resulted in an error in the first year, as it did, it would inevitably generate the same error in the later years. Unless Lonardo's "system" was changed, the understatement would go on forever. But it was merely an understatement, it was not willfulness.

Arguably, 1968 is a little different. That was the year in which no 1099 was received from Blue Shield, Medicare—Part B. However, the Doctor had been told that his Medicare income had been included in the regular 1099 issued

by Blue Shield for that year (478). Lonardo apparently did not think so, for he intended to file an amended return as soon as the figure was available. Characteristically, he did not go to his client's banking records for independent verification of the amount of Medicare income, nor did he seek an extension of time to file the return. He certainly should have done so, but this was negligence, it was not willfulness.

The defendant is not attempting to shift the blame to his bookkeeper. Dr. Booth was at least as negligent as Lonardo. He should not have relied so completely on a friend. He should not simply have signed the returns and sent them in with his check. He should have recognized the need for professional assistance in tax and accounting matters. He should have devoted less time to his practice and more time to his business. By current standards his office procedures, specifically his billing and record keeping procedures, were inadequate. But he was not indicted for these failures. He was indicted for knowingly and willfully attempting to evade his federal income taxes, and whatever his other deficiencies, the appellant contends that the prosecution failed to prove either knowledge or willfulness beyond a reasonable doubt. On the contrary, the evidence, taken as a whole and viewed most favorably to the Government, points unmistakably to good faith, cooperation and innocence.

Conclusion

The judgment of conviction should be reversed and the indictment dismissed. In the alternative, a new trial should be ordered in the interest of justice.

Buffalo, New York, June 25, 1976.

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AFFIDAVIT OF SERVICE BY MAIL

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Clayburn C. Booth

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Leslie R. Johnson

Sworn to before me this

29th day of June, 1976

Patricia A. Lacey

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NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1976